

IN THE CIRCUIT COURT OF NODAWAY COUNTY, MISSOURI

STATE OF MISSOURI, ex rel.)
JEREMIAH W. (JAY) NIXON,)
Attorney General)

and

**STATE BOARD OF EMBALMERS
AND FUNERAL DIRECTORS,
3605 Missouri Boulevard
P.O. Box 423
Jefferson City, Missouri 65102**

Plaintiffs,

V.

Case No. CV703-48CC

**ROSS E. JOHNSON, JR.
D/B/A JOHNSON FUNERAL HOMES,
951 South Main
Maryville, Missouri 64468**

and

**ESTATE OF ROSS E. JOHNSON, SR.)
D/B/A JOHNSON FUNERAL HOMES,)
Ross E. Johnson, Jr., personal representative)
951 South Main)
Maryville, Missouri 64468)**

and

ROBERT J. JOHNSON
D/B/A JOHNSON FUNERAL HOMES,
601 S. Munn
Maryville, Missouri 64468,

Defendants.

**AMENDED PETITION FOR PRELIMINARY AND PERMANENT
INJUNCTIONS, RESTITUTION, CIVIL PENALTIES,
AND OTHER COURT ORDERS**

COME NOW Plaintiffs, the State of Missouri by and through its Attorney General Jeremiah W. (Jay) Nixon and the State Board of Embalmers and Funeral Directors (the "Board"), by and through its counsel, the Attorney General, and for their cause of action state:

Nature of the Case

Plaintiffs bring this action to restrain and enjoin Defendants from continuing to operate funeral homes located in Albany, Maryville and Stanberry, Missouri known as Johnson Funeral Homes. These funeral homes are open for business and operating as funeral homes even though the facilities are in conditions that threaten the health, safety and welfare of the communities they serve. Plaintiffs request the Court to issue injunctive relief prohibiting the operation of Johnson Funeral Homes in Albany, Maryville and Stanberry, Missouri until such time as these facilities meet the sanitation and repair standards set forth in Missouri statutes and regulations. This petition for preliminary and permanent injunctions is to prevent harm to the clients and patrons of Johnson Funeral Homes and to the public.

Plaintiffs also bring this action to restrain and enjoin Defendants from violating Chapters 407 and 436¹ in connection with the sale of preneed funeral contracts. Defendants have sold preneed funeral contracts to Missouri consumers either directly or acting as agents for other preneed sellers. Defendants have collected monies from consumers to fund preneed contracts and retained for their own use amounts in excess of twenty percent of these funds in violation of Missouri statutes and regulations. Defendants failed to place at least eighty percent of these

¹ All references, unless otherwise noted, are to Missouri Revised Statutes 2000.

funds in preneed trust accounts as required by law. Plaintiffs seek restitution for preneed purchasers as well as other monetary relief.

The Parties

1. Jeremiah W. (Jay) Nixon is the duly elected, qualified and acting Attorney General of the State of Missouri and brings this action in his official capacity pursuant to Chapters 407 and 436.

2. The Board is an agency of the State of Missouri created and existing pursuant to Section 333.151 for the purpose of administering and enforcing provisions of Chapters 333 and 436 and the Board's regulations adopted pursuant to Chapters 333 and 436.

3. Ross E. Johnson, Jr., a natural person, resides in Nodaway County, Missouri, and holds funeral director license number 004910 issued by the Board.

4. Johnson Funeral Homes is an unincorporated business whose name is registered as a fictitious name with the Missouri Secretary of State.

5. Johnson Funeral Homes is owned by the Estate of Ross E. Johnson, Sr. (80 percent), Ross E. Johnson, Jr. (10 percent), and Robert J. Johnson (10 percent).

6. Ross E. Johnson, Jr. is the personal representative of the estate of Ross E. Johnson, Sr., both of whom are/were residents of Nodaway County, Missouri.

7. Before his death, Ross E. Johnson, Sr. was a licensed funeral director in the State of Missouri and resided in Nodaway County, Missouri.

8. Robert J. Johnson, a natural person, resides in Nodaway County, Missouri and holds funeral director license number 004909 issued by the Board.

9. Johnson Funeral Homes has three physical locations each of which holds current and active funeral establishment licenses issued by the Board (collectively, "Johnson Funeral Homes Facilities").

10. Johnson Funeral Homes located at 951 South Main, Maryville, Nodaway County, Missouri, holds funeral establishment license number 1974 (the "Maryville Facility").

11. Johnson Funeral Homes located at 304 East Clay, Albany, Gentry County, Missouri, holds funeral establishment license number 1503 (the "Albany Facility").

12. Johnson Funeral Homes located at 2nd & Elm, Stanberry, Gentry County, Missouri, holds funeral establishment license number 1972 (the "Stanberry Facility").

Jurisdiction

13. This Court has jurisdiction over this cause of action pursuant to Section 333.241 which authorizes the Board to seek injunctive relief to prevent any person from engaging in any practice or business which presents a substantial probability of serious danger to the health, safety or welfare of any resident of this state or client or patient of the licensee. Section 333.241 provides, in part:

1. Upon application by the board, and the necessary burden having been met, a court of general jurisdiction may grant an injunction, restraining order or other order as may be appropriate to enjoin a person from:

* * *

2. Engaging in any practice or business authorized by a certificate of registration or authority, permit or license issued pursuant to this chapter upon a showing that the holder presents a substantial probability of serious danger to the health, safety or welfare of any resident of this state or client or patient of the licensee.

14. This Court also has jurisdiction over this cause of action pursuant to Section 407.100 which provides in part:

1. Whenever it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitation, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.
2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds of accounts if the court finds their funds or property may be hidden or removed from this state or that such orders or injunctions are otherwise necessary.
3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.
4. The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured.
5. The court, in its discretion, may appoint a receiver to insure the conformance to any orders issued under subsection 3 of this section or to insure the payment of any damages ordered under subsection 4 of this section.

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.

15. This court also has jurisdiction over this cause of action pursuant to Section 436.061.2 which provides:

Any violation of the provisions of sections 436.005 to 436.071 shall constitute a violation of the provisions of section 407.020, RSMo. In any proceeding brought by the attorney general for a violation of the provisions of sections 436.005 to 436.071, the court may, in addition to imposing the penalties provided for in sections 436.005 to 436.071, order the revocation or suspension of the registration of a defendant seller.

Venue

_____16. Venue is proper before this Court pursuant to Section 333.241.2 which provides that "[a]ny such action shall be commenced either in the county in which such conduct occurred or in the county in which the defendant resides."

17. Venue is also proper before this Court pursuant to Section 407.100.7 which provides that "[a]ny action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business."

18. Defendants in this action reside in Nodaway County, have their principal place of business in Nodaway County, and some of the alleged violations occurred in Nodaway County.

Danger to Health, Safety, or Welfare

19. Funeral establishments provide a special and unique service to a community and a funeral establishment must maintain adequate levels of sanitation and repair to properly serve a community.

20. Section 333.011(4) defines funeral establishments as:

"Funeral establishment", a building, place or premises devoted to or used in the care or preparation for burial or transportation of the human dead and includes every building, place or premises maintained for that purpose or held out to the public by advertising or otherwise to be used for that purpose.

21. By regulation, the Board requires funeral establishments to meet certain standards to protect the health, safety and welfare of the community.

22. 4 CSR 120-2.070 provides, in relevant part:

13. The interior and exterior of the funeral establishment physical plant shall be kept free and clean of litter, dirt, debris and clutter or other objects or conditions which present a potential or actual hazard to the health, safety or welfare of the public.

14. The interior and exterior of the funeral establishment physical plant shall be maintained in a manner which does not present a potential or actual hazard to the health, safety or welfare of the public.

23. 4 CSR 120-2.090 provides, in relevant part:

3. Floors, Walls and Ceilings. All preparation room floor surfaces must be smooth, nonabsorbent materials and so constructed as to be kept clean easily. Floor drains must be provided where the floor is to be subjected to cleaning by flooding. All walls and ceilings must be easily cleanable and light colored, and must be kept and maintained in good repair. All walls shall have washable surfaces.

9. All preparation rooms and all articles stored in them must be kept and maintained in a clean and sanitary condition. All embalming tables, hoppers, sinks, receptacles, instruments and other appliances used in embalming or other preparation of dead human bodies must be so constructed that they can be kept and maintained in a clean and sanitary condition. The following minimum standards shall apply:

- (A) An eye wash kit (bank) must be present and operable;
- (B) Facilities must exist for the proper sterilization of embalming instruments and the embalming table;
- (C) Facilities for the proper storage of embalming instruments must be maintained. At a minimum, a chest or cabinet must be used for the storage of embalming instruments;
- (D) All types of blocks used in positioning a dead human body on an embalming table must be made of non-absorbent material. All wooden blocks must be sealed and painted with enamel; and
- (E) When not in use, embalming tables must be cleaned, sterilized and covered with a sheet.

12. Preparation rooms shall contain only the articles, instruments, and items that are necessary for the preparation, embalming, and final disposition of dead human bodies.

24. On or about July 29, 2002, the Board inspected the Albany Facility and found the following violations:

- a. Rotten boards located in front windows;
- b. Gutters were not properly connected to the building;
- c. Exterior paint was either peeling or missing;
- d. Excessive water damage found in carport roof;

- e. Marks located on interior walls appearing to be animal clawing;
- f. Damage from animals being loose in the building;
- g. Chewed up ceiling tiles;
- h. Dead bird in hallway;
- i. Restroom floor was dirty with trash and leaves on it;
- j. Restroom sink full of animal excrement; and
- k. Embalming room filled with trash, leaves and animal excrement.

25. The Albany Facility remains open for business and is operating as a funeral establishment.

26. On or about July 29, 2002, the Board inspected the Maryville Facility and found the following violations:

- a. Embalming room floor was not clean;
- b. Ceiling, walls and fixtures in the embalming room were dirty and dusty; and
- c. Laundry was stored on embalming table.

27. The Maryville Facility is open and operating as a funeral establishment.

Responsibility of Ross E. Johnson, Jr.

____28. Ross E. Johnson, Jr. is the funeral director in charge at the Maryville Facility, the Stanberry Facility, and the Albany Facility.

29. As the funeral director in charge, Ross E. Johnson, Jr. is responsible for the general control, supervision and management of the Johnson Funeral Homes Facilities. 4 CSR 120-2.070(5).

30. Funeral establishment clients enter a professional trust relationship with a funeral home and the licensees and representatives employed therein when seeking funeral services and are entitled to rely upon the special knowledge and skills evidenced by professional licensure.

31. Section 333.011(7) defines the "practice of funeral directing" as

[E]ngaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control, supervision or management of the operations of a funeral establishment.

32. As the funeral director in charge, Ross E. Johnson, Jr. is and was at all relevant times stated herein responsible for ensuring that the Johnson Funeral Homes Facilities comply with Missouri statutes and regulations and that the Johnson Funeral Homes Facilities are maintained to protect the health, safety and welfare of the members of the communities they serve.

33. Ross E. Johnson, Jr. has failed in his responsibilities to the Johnson Funeral Homes Facilities.

34. Although the Board's inspector found no health and safety violations at the Stanberry Facility, Ross E. Johnson, Jr. has shown his lack of competence in caring for the Maryville Facility and the Albany Facility and there is a substantial probability that the Stanberry Facility will be allowed to deteriorate under his management to the extent that it will present a serious danger to the health, safety and/or welfare of the community.

Preneed Trust Accounts

_____35. Section 436.005 (5) defines a "Preneed Contract" as "any contract or other arrangement which requires the current payment of money or other property in consideration for the final disposition of a dead human body, or for funeral or burial services or facilities, or for funeral merchandise, where such disposition, services, facilities or merchandise are not immediately required . . ."

36. Section 436.005 (9) defines "Seller" as "the person who sells a preneed contract to a purchaser and who is obligated to collect and administer all payments made under such preneed contract."

_____37. A "provider" is defined by Section 436.005 (7) as "the person obligated to provide the disposition and funeral services, facilities, or merchandise described in a preneed contract".

_____38. A preneed trust is defined by Section 436.005 (6) as "a trust established by a seller, as grantor, to receive deposits of, administer, and disburse payments received under preneed contracts by such seller, together with income thereon."

39. Section 436.021.1 provides in pertinent part:

No person, including without limitation a person who is a provider under one or more preneed contracts, shall sell, perform or agree to perform the seller's obligations under, or be designated as the seller of, any preneed contract unless, at the time of that sale, performance, agreement, or designation, that person shall:

(2) Have established, as grantor, a preneed trust or trusts with terms consistent with sections 436.005 to 436.071; . . .

40. Section 436.027 provides:

The seller may retain as his own money, for the purpose of covering his selling expenses, servicing costs, and general overhead, the initial funds so collected or paid until he has received for his use and benefit an amount not to exceed twenty percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.

____41. From an exact date unknown, Defendants have sold preneed funeral contracts to Missouri consumers.

42. Some preneed funeral contracts were sold to Missouri consumers directly by Defendants or their employees.

43. Other preneed funeral contracts were sold by Defendants or their employees acting as an agent for National Prearranged Services (NPS) and other preneed sellers.

44. In connection with the sale of preneed funeral contracts, Defendants have accepted moneys from preneed purchasers to fund the preneed contracts.

45. Some of the moneys collected by Defendants to fund the preneed contracts were deposited in accounts at Nodaway Valley Bank, Bank Midwest, and First Bank, N.A.

46. The account at Nodaway Valley Bank, number 112390 is in the name of Johnson Funeral Homes and lists Defendants as signatories on the account.

47. The account at Bank Midwest, number 4100020877 is in the name of Johnson Funeral Homes and lists the Defendants as signatories on the account.

48. The account at U.S. Bank, number 5900014738 is in the name of National Security Trusts and lists the Defendants as signatories on the account.

49. The bank accounts listed in paragraphs 42-44 are not preneed trust accounts.

50. Defendants failed to transfer preneed funeral funds collected directly from preneed purchasers into a preneed trust account.

51. Defendants also failed to transfer preneed funeral funds which they collected from preneed purchasers on behalf of NPS or other sellers to NPS or other sellers for placement in a preneed trust account.

52. Defendants are also a designated provider on preneed funeral contracts sold to Missouri consumers.

53. Upon the death of some preneed purchasers, Defendants received preneed funds in excess of the cost expended by Defendants to provide funeral services.

54. Defendants have retained the excess funds and have not returned the excess funds to the families of the deceased.

Violations of Chapter 436

_____55 Defendants Ross J. Johnson, Jr. d/b/a Johnson Funeral Homes, Robert J. Johnson d/b/a Johnson Funeral Homes, and Estate of Ross E. Johnson Sr. d/b/a Johnson Funeral Homes have violated the provisions of Chapter 436 by:

a. Selling preneed contracts without having established a preneed trust account in violation of Section 436.021.

b. Retaining as their own money for their own use and benefit amounts exceeding twenty percent of the total amount agreed to be paid by the purchaser of prepaid funeral benefits as such total amount is reflected in the contract, in violation of Section 436.027.

Merchandising Practices Act Violations

_____56. Section 407.020 provides in pertinent part:

1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is declared to be an unlawful practice. . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

57. Defendants Ross E. Johnson, Jr. d/b/a Johnson Funeral Homes, Robert J. Johnson d/b/a Johnson Funeral Homes, and Estate of Ross E. Johnson Sr. d/b/a Johnson Funeral Homes have violated Section 407.020 in connection with the sale of preneed funeral services, by:

a. Engaging in the unfair practice of violating Section 436.027 by retaining as their own money for their own use and benefit amounts exceeding twenty percent of the total amount agreed to be paid by the purchasers of prepaid funeral benefits as such total amount is reflected in the contract.

b. Engaging in the unfair, unethical and unscrupulous practice of retaining preneed funeral funds which by statute and contract were required to be placed in a preneed trust account.

c. Engaging in the unfair, unethical and unscrupulous practice of retaining preneed funeral funds in excess of their cost in providing funeral services to preneed purchasers.

d. Falsely promising, expressly or impliedly, that at least eighty percent of preneed funeral funds obtained from preneed purchasers would be placed in a preneed trust account.

e. Fraudulently retaining preneed funeral funds obtained from preneed purchasers by breaching their duty to place such funds in a preneed trust account to the injury of the purchaser.

Relief Sought

_____Ross E. Johnson Jr., Ross E. Johnson, Jr., as personal representative of the Estate of Ross E. Johnson, Sr., and Robert J. Johnson collectively doing business as Johnson Funeral Homes are engaging in conduct that presents a substantial probability of serious danger to the health, safety or welfare of residents of this state in that two of the funeral home facilities are being kept in states of disrepair and filth and one of the funeral home facilities is at risk of degenerating into disrepair and filth. These Defendants are also engaging in conduct in connection with the sale of preneed trust accounts that violate chapters 407 and 436. Such conduct should be enjoined as it threatens irreparable harm to the health, safety and welfare of clients and prospective clients of Johnson Funeral Homes Facilities and of the public. The Attorney General and the Board have no adequate remedy at law.

WHEREFORE, based upon the foregoing, the Attorney General and the Board pray the Court for the following relief:

1. Issue an Order finding that Ross E. Johnson, Jr. and each of the Johnson Funeral Home Facilities have violated 4 CSR 120-2.070 (13) and (14), 4 CSR 120-2.090 (3), (9) and (12), and that as a result of these violations, the condition of the Maryville Facility and the Albany Facility present a serious danger to the health, safety and/or welfare of the public.
2. That there exists a substantial probability that the Stanberry Facility will be permitted to deteriorate under current management so as to create a serious danger to the health, safety and/or welfare of the public.
3. Issue an Order granting preliminary and permanent injunctive relief restraining and enjoining Ross E. Johnson, Jr. from offering to engage or engaging in any acts or practices

the performance of which constitutes the practice of funeral directing at the Albany Facility, the Maryville Facility, and the Stanberry Facility, including, but not limited to, meeting with members of the public and customers of Missouri funeral establishments for the purpose of making funeral, burial, or disposal arrangements for dead human bodies; conducting, directing or supervising funeral services or the burial or disposal of dead human bodies; selling or offering for sale funeral merchandise; and engaging in the general control, supervision or management of the operations of any Missouri funeral establishment.

4. Issue an Order granting preliminary and permanent injunctive relief restraining and enjoining Defendants from using the Albany Facility, the Stanberry Facility and the Maryville Facility as funeral establishments as that term is defined in Section 333.011(4).

5. Issue an Order finding that Defendants have violated the provisions of Section 407.020, 436.027 and 436.021.

6. Issue an Order granting preliminary and permanent injunctive relief restraining and enjoining Defendants and their agents, servants, employees, representatives, and other individuals acting at their direction or on their behalf from violating Sections 407.020, 436.027 and 436.021 through the use of any of the unlawful, unfair and deceptive acts and practices alleged herein.

7. Issue an Order, pursuant to Section 436.007 declaring each preneed contract sold in violation of Sections 407.020, 436.027 and 436.021 void and unenforceable at the option of the purchaser.

8. Issue an Order, pursuant to Section 407.100.4, requiring Defendants, jointly and severally, to provide full restitution to any persons who have suffered any ascertainable loss by means of any unlawful, unfair and deceptive acts and practices alleged herein.

9. Issue an Order, pursuant to Section 407.100.6, awarding the State a civil penalty From Defendants, jointly and severally, for each violation of Sections 407.020, 436.027 or 436.021 that the Court finds to have occurred.

10. Issue an Order, pursuant to Section 407.140.3, requiring Defendants, jointly and severally, to pay the State an amount of money equal to ten percent of the total restitution ordered against said Defendants, or such other amount as the Court deems fair and equitable.

11. Issue an Order, pursuant to Section 407.100.5 appointing a receiver.

12. Issue an Order, pursuant to Section 407.130 requiring the Defendants, jointly and severally, to pay all court and investigative and prosecution costs of this case.

13. Issue an Order, requiring the Defendants, jointly and severally, to pay all other costs of this proceeding, including, but not limited to, the Board's investigative costs, attorney fees, witness fees and expenses incurred in prosecuting this action.

14. Any other and further relief as the Court deems just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General